R. T. D. 18/ 89 Decision rendered on December 21, 1989

THE CANADIAN HUMAN RIGHTS ACT (R. S. C. 1985, C. H- 6 as amended)

IN THE MATTER Of: A hearing before a Human Rights Review Tribunal Appointed under subsection 42.1(2) of the Canadian Human Rights Act.

BETWEEN:

BONNIE ROBICHAUD Appellant (Complainant)

- and CANADIAN HUMAN RIGHTS COMMISSION Commission - and

DENNIS BRENNAN AND HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY TREASURY BOARD Respondent

DECISION OF THE REVIEW TRIBUNAL

HEARD BEFORE:
Lois Dyer- Mann, Chairperson
Paul Mullins
Wendy Robson

APPEARANCES: Marguerite Russel, Counsel for the Appelant
Donald J. Rennie, Alain Préfontaine, Counsel for the Respondent
James Hendry, Cheryl Crane and Patricia Lindsey Peck, Counsel for the Commission
Andrew Raven, Counsel for the Public Service Alliance of Canada

Heard in Ottawa, Ontario on November 28 to 30, 1988, January 30 to February 1, 1989, February 6 to 7, 1989, June 13 to 15, 1989 and July 17 to 18, 1989.

This decision is a supplement to the Review Tribunal decision number T. D. 4/ 83 rendered on February 21, 1983.

> INTRODUCTION

The history of this case is unusually long because of the extensive tribunal and court hearings and the appeals. Since the Honorable Mr. Justice LaForest has succinctly reviewed the events leading up to the Supreme Court of Canada in his decision, we intend to only set out subsequent developments. (see Bonnie Robichaud and the Canadian Human Rights Commission v. Her Majesty the Queen, as Represented by the Treasury Board (1987) 2 SCR 84, at p. 87 88.)

Following the Tribunal hearings Mrs. Robichaud continued to work at CFB North Bay and Mr. Brennan, the supervisor and harasser, continued in his position of authority. In Mrs. Robichaud's view, the conditions of employment continued to be difficult because of the presence of and influence of Mr. Brennan. In February, 1984, she took a secondment to the Troy Armoury

without her former supervisory responsibilities. Her period of employment at the Armoury resulted in her filing three grievances, all of which were denied although later investigated by the Public Service Commission which supported her. Eventually, she asked for a transfer back to the base which was granted in early March, 1985.

On her return to the base she was summoned to a meeting with Major Growen and Ken Wilkinson who was to be her immediate supervisor. At the meeting she was both welcomed back and advised not to discuss the matters in these proceedings which were before the court. In the latter part of April, 1985, various incidents occurred which she perceived to be insubordination by her staff but for which she was reprimanded instead. She took 25 days of sick leave. Her leave to appeal to the Supreme Court of Canada was granted during this time.

> - 2 Encouraged by that development, she returned to work May 28, 1985. Several incidents involving altercations with her fellow employees occurred on her first two days back resulting in her suspension without pay. It was only while she was being disciplined with respect to these altercations that she was told of Brennan's suspension two days earlier. Her workmates had not been informed of the new developments in a way which would prepare them for Mrs. Robichaud's return to the workplace. Mr. Brennan was subsequently dismissed on June 29, 1985, although this information was not communicated to Mrs. Robichaud until this Tribunal recommenced sittings in the fall of 1988.

On June 4 she was instructed to attend a National Health and Welfare psychiatric assessment. Complaints were filed under the Public Service Staff Relations Act by her union, the Public Service Alliance of Canada.

A Public Service Commission investigation, completed in July, upheld many of her grievances or complaints, confirmed that she was to return to work September 9, 1985, and awarded her back pay.

This decision led to the negotiations that took place in August through October of 1985 involving the employer, Mrs. Robichaud, her union (PSAC) and the Public Service Commission. These negotiations had been suggested in the Public Service Commission report. (Ex C1)

A tentative, hand- written agreement dated August 19, 1985, was signed by Alliance and Union representatives and Mrs. Robichaud. A more formal draft was tendered October 17, 1985, which was reviewed by Mrs. Robichaud and her counsel but rejected because it did not protect her right to continue to the Supreme Court on the question of the employer liability for the violation of the Canadian Human Rights Act. A redrafted

> - 3 Agreement was signed October 31, 1985. At all material times Mrs. Robichaud had the assistance and support of her union and was well advised by her counsel. Her major goal was to ensure for others freedom from harassment in the workplace. She was free to continue her fight to the Supreme Court of Canada on the question of employer liability (her public goal) while enjoying the benefit of a personal settlement.

The terms of this private agreement are set out as follows: " STATEMENT OF AGREEMENT

BETWEEN BONNIE ROBICHAUD AND THE DEPARTMENT OF NATIONAL DEFENCE

It is agreed that: I. Her Majesty the Queen in right of Canada, as represented by the

Department of National Defence, will grant Mrs. Bonnie Robichaud three years' leave with pay, which shall commence at the date of signing of this Agreement. If, during this period, Mrs. Bonnie Robichaud enrols in a formal course at a recognized educational institution in Canada, Mrs. Robichaud will be reimbursed for her actual cost of tuition and actual costs of textbooks required for the course.

II. In consideration of the foregoing, at the end of her leave period Mrs. Robichaud agrees to accept a transfer to be arranged through the Public Service Commission from her present position to a position at the same salary level, which position will not be a Department of National Defence.

Should the transfer referred to above require that Mrs. Robichaud be relocated outside the North Bay area, any expenses to be incurred because of such relocation will be paid by the employer.

Mrs. Bonnie Robichaud further agrees to the following: III. To withdraw:

1. (a) her complaint pursuant to section 45 of the Canadian Human Rights Act;

(b) her complaint pursuant to section 20 of the Public Service Staff Relations Act;

> - 4 (c) with the concurrence of the Public Service Alliance of Canada, the

complaint pursuant to section 98 of the Public Service Staff Relations Act;

and 2. To accept that the compensation provided for pursuant to Paragraph I of this Agreement constitutes full and final compensation to which she is entitled following the complaint filed against Mr. Brennan and the Department of National Defence alleging sexual harassment.

IV. Her Majesty the Queen in right of Canada, as represented by the Department of National Defence, Mrs. Bonnie Robichaud and the Public Service Alliance of Canada hereby agree that the only public communication which will be made relating to this Agreement will be as follows:

"On 'a specified date', Mrs. Bonnie Robichaud and the Department of National Defence arrived at a settlement of all of Mrs. Robichaud's complaints following her initial sexual harassment complaint against her supervisor, Mr. Brennan, and the Department of National Defence.;

V. Failure to abide by the terms of paragraph IV hereof, will render this Agreement null and void.

VI. This does not prevent the Canadian Human Rights Commission or any party to this Agreement from pursuing this matter presently before the Supreme Court of Canada. "

In accordance with that agreement, Mrs. Robichaud attended school for two years. She did not complete the third because of a variety of stresses on her. She was also concerned that she would have to leave North Bay in order to ensure access to the employment in another arm of government. Her relocation costs have not been paid because of a dispute about how they are to be determined. Her three year period of full pay ended October 31, 1988. Several offers of employment have been made to her but by the completion of these hearings no satisfactory and permanent employment had been accepted by her, to our knowledge.

> - 5 The first question for this Tribunal to decide is whether it has the power to review and set aside the agreement at the request of one of the parties to it. If we find we do have the power to do so, we must decide whether the circumstances and or the terms of the agreement compel us to do so. Finally, we must decide what remedies are appropriate to order at this late date.

A. JURISDICTION We take our guidance primarily from the firm and unequivocal decision of the Supreme Court of Canada in this case.

Mr. Justice Gerald LaForest commenced his analysis with a consideration of S. 2 of the Human Rights Act, the section that states the purpose and objects of the Act. He states as follows:

"It is worth repeating that by its very words, the Act (S. 2) seeks 'to give effect' to the principle of equal opportunity for individuals by

eradicating invidious discrimination. It is not primarily aimed at punishing those who discriminate... Rather, the Act is directed to redressing socially undesirable conditions ... p. 90

"Any doubt that might exist on this point is completely removed by the nature of the remedies provided to effect the principles and policies set forth in the Act. This is all the more significant because the Act, we saw, is not aimed at determining fault or punishing conduct. It is remedial. Its aim is to identify and eliminate discrimination." at p. 92

Mr. Justice LaForest examined the remedies available under the Act with particular reference to subsections 41(2) and (3). He said at p. 93:

"It is clear to me that the remedial objectives of the Act would be stultified if the above remedies were not available as against the employer."

Mr. Justice LaForest adopted the reasoning of MacGuigan, J. (in dissent): Who but an employer could order programs in the

> - 6 workplace? Who but an employer could order compensation for lost wages and expenses?

" Indeed, if the Act is concerned with the effects of discrimination rather than its causes (or motivation) it must be admitted that only an employer can remedy undesirable effects; only an employer can provide the most important remedy - a healthy work environment."" Not only would the remedial objectives of the Act be stultified if a narrower scheme of liability were fashioned; the educational objectives it embodies would concomitantly be violated." at p. 94

This Tribunal is compelled by the reasoning of the Court so clearly articulated by Mr. Justice LaForest. The broad objectives of the Act are to serve the public policy of the country which finds that discriminatory practices violate public as well as private interests. We must consider the broader interests served by the Act and look to the remedies available to us to ensure that the educational as well as prohibitive purposes are served.

In the final paragraph of the decision, Mr. Justice LaForest indicated the Court was aware that a settlement had been reached with Mrs. Robichaud and was of the view that it may not provide a full corrective to the problem identified. The Court did not have the terms of the settlement to be able to consider them. The Court was of the expressed view that despite the existence of a private settlement, there may be work for the Review Tribunal to do to complete its task as mandated by the Act. The Court restored the decision of the Review Tribunal and thereby returned the matter to us for our final determination on the matter of damages.

> - 7 We have been asked to set aside the agreement by counsel for Mrs. Robichaud. She bases her argument on allegations of duress and issues of public policy. She argues that the agreement is contrary to public policy because of the non- disclosure provision and the absence of an apology.

Counsel for DND argued that the agreement represented a binding, valid, legally enforceable agreement, completely disposing of all issues arising from Mrs. Robichaud's sexual harassment complaint.

To a limited extent we agree. It is indeed a valid, binding and enforceable agreement. And we find the arguments advanced by Mrs. Robichaud suggesting the agreement was reached under conditions of duress, oppression, lack of adequate counsel, and undue pressure to be unconvincing. The evidence of Mrs. Robichaud herself clearly indicated that she was represented by counsel throughout, was advised and supported by PSAC and received friendly advice from time to time from Dr. Marguerite Ritchie. By her own words, Mrs. Robichaud indicated satisfaction with the terms of the settlement, which permitted the continuance to the Supreme Court of Canada on the matter of employer liability, which was a matter of considerable importance to her. Mrs. Robichaud's counsel at that time, Mr. Scott MacLean, found the settlement to be generous, perhaps more so than could otherwise have been achieved. We cannot set the agreement aside on that issue.

B. REMEDIES UNDER THE ACT " S41.(2)-- If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, subject to sub- section (4) and section 42, it may make an order against the person found to be engaging or to have

> - 8 engaged in the discriminatory practice and include in such order any of the following terms that it considers appropriate:

a) that such person cease such discriminatory practice and, in order to prevent the same or a similar practice from occurring in the future, take measures, including

(i) adoption of a special program, plan or arrangement referred to in subsection 15 (1), or (ii) the making of an application for approval and the implementing of a plan pursuant to section 15.1, in consultation with the Commission on the general purposes of those measures; b) that such person make available to the victim of the discriminatory practice on the first reasonable occasion such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice; c) that such person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and any expenses incurred by the victim as a result of the discriminatory practice; and d) that such person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and any expenses incurred by the victim as a result of the discriminatory practice.

(3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that:

(a) a person is engaging or has engaged in a discriminatory practice willfully or recklessly, or

> - 9 (b) the victim of the discriminatory practice has Buffered in respect of feelings or self-respect as a result of the practice, the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

This Tribunal has reviewed the remedies under two heads: those that serve a broader public purpose in their remedial measure, and those that are directed to restitution for personal (private) indignities. Sections 41 (2) (a) (b) (c) and 41 (3) (a) M serve the public interest by acting as a deterrent for employers or as an educational vehicle cautioning employers with respect to matters such as poisoned work environment or the power/ vulnerability relationship existing between supervisors and the supervised. These remedial components of the Act are there to guide the public and private interest alike: the public must be made aware that the Act will not tolerate certain conduct and will punish employers, who have an obligation to comply with the legislation, while the private citizen who may be a victim of a poisoned work environment or other discriminatory practice can seek personal remedies.

In order for the Tribunal to fulfill its responsibilities under the Act, then, we must consider the terms of the agreement to ensure that an appropriate "full corrective" is achieved with respect to the matters of public policy at issue in the circumstances before us. We believe the settlement is conclusive of any private remedies. We find it unnecessary to set aside the private agreement in order to ensure that the public interests identified by S. 2 of the Human Rights Act are addressed.

Accordingly, we will not address the claims for job guarantees, moving expenses, personal time, interest and costs. With regard to the issues of pain and suffering and the apology,

> - 10 we find a blend of both private and public interest is present and we will address this below.

C. SECTION 41 (2)(a) PROGRAM/ PLAN We are pursuaded by the evidence that DND has been responsive to the finding of discrimination in a variety of ways since the early 80's.

Programs have been established and procedures created to bring about improved awareness of the forms of discrimination. Brochures have been distributed, information posted and newsletter articles written to highlight the forms of discrimination, including sexual harassment. Types of prohibited conduct were identified and the provisions of the Act articulated. Procedures have been identified and made known for lodging and dealing with complaints.

Members of this Tribunal recommend that the impressive gains in programming and planning to deal with forms of discrimination be sustained and encourage DKD to build on the commendable action noted to date. We would urge that programming and educational awareness activities continue so that consistency of application and sensitivity can be built for the future benefit of the employee and employer alike. We are unable to assess the

effectiveness of these actions at this time. No further order will be made. The healthier work environment, the most basic purpose of Bonnie Robichaud in pursuing this matter, will not be lost. We believe that Mrs. Robichaud's goal of a healthy work environment is being achieved. Due to her persistence and personal sacrifices in pursuing the matter, when a lesser individual would have abandoned the cause, employees throughout Canada have benefitted.

Although we have held that the private agreement has settled her monetary claims, S. 41 (3) (b), which deals with the matter

> - 11 of pain and suffering, goes beyond a mere private entitlement. Its primary purpose is to signal society's condemnation of discriminatory practices. It is not intended to be a full monetary compensation by way of damages for the pain and suffering experienced by the victim. We find an award under this section is not precluded by reason of the private settlement.

In determining the amount of the award, the Tribunal has considered the following factors. In particular:

a) the singling out of Mrs. Robichaud by downgrading her job responsibilities; b) the failure to monitor Brennan's conduct to prevent him from attempting to influence witnesses before the Tribunal of the first instant; c) the failure to prepare both Robichaud and her fellow employees for her return to work two days after Brennan's dismissal; and d) the failure, even to this date, to offer an unequivocal apology to Mrs. Robichaud.

We believe the existence of the cap of $5000 does not suggest a rating structure whereby one must experience the "worst" case of discrimination in order to be awarded the maximum. Nor are we persuaded that the Charter arguments advanced by counsel for Mrs. Robichaud have any merit. The existence of a cap of $5000 is not of itself a discriminatory act by Parliament.

Accordingly, we make an order for payment of $5000 under this Section of the Act.

D. APOLOGY Any apology goes far beyond a confirmation of the personal vindication of the victim. It serves a broad educational function that can advance the purposes of the Act: it tells every

> - 12 employee throughout the country and abroad that a prominent institution and employer in our society stands firmly for equality in the workplace. By its very existence it acknowledges that it was a party to a serious affront to human dignity. It holds out the hope and the commitment that the mistakes of

the past will not be repeated in the future. We recognize that an apology under compulsion is somewhat diminished but nevertheless the gesture and words signal an important commitment to change.

Accordingly, we order that a formal apology be given to Bonnie Robichaud and that it be posted throughout all DND facilities.

While we have no jurisdiction to enforce compliance with the terms of the private settlement, we nevertheless expect that its terms be honored including the provision of a suitable permanent Position in the Public Service, at a level that reflects the upgraded quaifications and experience Mrs. Robichaud has earned in the interim, and that she be paid her moving expenses according to the approved federal government guidelines in effect at the time of the move.

We feel compelled to comment on one aspect of these proceedings which disturbed us. It appeared that the Human Rights Commission, following upon the decision of the Review Tribunal, did not provide the degree of support and assistance to the complainant that we would have expected. In fact, it was clear that had it not been for Mrs. Robichaud's determination, this matter would not even have proceeded to the Supreme Court of Canada, much less have been returned to this Tribunal. We do not believe that the public interest has been adequately served in this regard.

> - 13 ORDER The Review Tribunal has considered the merits of the arguments made and consistent with its authority under Section 41(2) of the Canadian Human Rights Act makes the following order:

A. That the Department of National Defence pay Mrs. Robichaud $5,000 on account of pain and suffering; B. That a formal apology be given to Bonnie Robichaud and that it be posted throughout all DND facilities.

MEMBERS OF THE REVIEW TRIBUNAL PAUL MULLINS M. WENDY ROBSON M. LOIS DYER MANN (CHAIRPERSON) >-

- 14 While I agree with the findings of fact and the decision arrived at above, I would have gone further in the issue of the jurisdiction of the Tribunal to review the settlement reached by Mrs. Robichaud and DND. An important consideration is that the Commission was not a party to the agreement nor was the agreement made subject to the review of the Tribunal.

The same reasoning that the Supreme Court of Canada adopted to establish employer liability also leads me to conclude that any agreement entered into by a complainant is subject to review by the Tribunal and may be set aside or varied in the public interest in the appropriate case. The Supreme Court of Canada makes it clear when it considered the matter of employer liability in

this case, that the primary purpose of the Act is to address public policy concerns and not to provide a private remedy.

Unless a settlement agreement is subject to the review of a Tribunal there is a risk that the employer can "buy- off" a complainant without addressing the more fundamental purpose of the Act.

In this case, in addition to the order issued, I would have included in the order those matters which are recommendations in the decision of this Tribunal. The issue of non- disclosure was overtaken by events so that it became unnecessary for the Tribunal to address it.

It would be of assistance to future Tribunals if there were an express provision in the Act dealing with the question of jurisdiction to review settlements reached after proceedings before a Tribunal have been commenced.

Paul Mullins